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JUDICIAL ACTIVISM V. JUDICIAL ABDICATION: A PLEA FOR A RETURN TO THE *LOCHNER* ERA SUBSTANTIVE DUE PROCESS METHODOLOGY

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> Individuals have rights, and there are things no person or group may do to them (without violating their rights).
>
> —ROBERT NOZICK[1]

INTRODUCTION

Perhaps one of the most enduring controversies in constitutional law is the debate over "judicial activism." Although specific definitions of this phrase may vary, it is generally understood to refer to judicial interference in the legislative process.[2] One of the most vocal critics of an "activist" judiciary is Justice Antonin Scalia, who believes that judicial intervention into matters that (according to him) belong solely to the legislatures is a "threat to constitutional democracy."[3] Over the last few decades, however, there has also been a movement in support of expanding the judiciary's role with respect to the protection of individual rights and liberties.[4] At the constitutional level, this debate generally centers around the proper interpretation of the Due Process Clauses of the Fifth and Fourteenth Amendments.[5] Whereas jurists of Justice Scalia's persuasion favor a highly restrictive interpretation of these clauses, advocates of a more expansive judicial role tend to emphasize their original meaning at the time they were enacted.

This Comment addresses the constitutional protection of individual rights and liberties within the context of *Abigail Alliance v. Eschenbach*, where the question before the court was whether terminally ill individuals

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1. ANARCHY, STATE, AND UTOPIA ix (1974).

2. CLINT BOLICK, DAVID'S HAMMER: THE CASE FOR AN ACTIVIST JUDICIARY ix (2007).

3. ANTONIN SCALIA & RICHARD A. EPSTEIN, SCALIA V. EPSTEIN: TWO VIEWS ON JUDICIAL ACTIVISM 4 (1985).

4. *See* BOLICK, *supra* note 2, at x (stating that "the problem with judicial activism . . . is not too much of it but too little"); SCALIA & EPSTEIN, *supra* note 3, at 10 ("I [(Professor Richard Epstein)] speak as an academic who would impose on sitting judges duties more extensive than they are often willing to assume").

5. *See infra* Part II.

had a constitutional right to access certain experimental pharmaceutical drugs that had the potential to save their lives.[6] Part I of this Comment discusses both the facts and outcome of the court's decision in *Abigail Alliance*. In Part II, this Comment briefly tracks the history of the Supreme Court's jurisprudence with respect to the protection of individual rights and liberties under the Due Process Clause of the Fourteenth Amendment ("substantive due process"). Part III discusses a possible shift in the Court's substantive due process methodology based on its decision in *Lawrence v. Texas*.[7] In Part IV, this Comment explains the shortcomings of the Court's established substantive due process framework within the context of *Abigail Alliance*. Finally, given these shortcomings, Part V suggests that the court in *Abigail Alliance* should have reviewed the asserted right in question under a *Lawrence* framework, which would likely have resulted in a much different outcome.

I. *ABIGAIL ALLIANCE V. ESCHENBACH*

Abigail Alliance involved a suit against the Food and Drug Administration (FDA) by Abigail Alliance for Better Access to Developmental Drugs (the "Alliance"), a non-profit organization comprised of terminally ill individuals who seek access to potentially life-saving drugs.[8] As a general matter, however, the federal government restricts individual access to newly developed pharmaceutical drugs.[9] Through the FDA, the federal government requires pharmaceutical companies to subject any new drugs to a lengthy investigatory process before they can be sold to the public.[10] The FDA first requires pharmaceutical companies to file an application before bringing the drug to market.[11] This application process can take an enormous amount of time, given that "no drug may be approved without a finding of 'substantial evidence that the drug will have the effect it purports or is represented to have.'"[12] As a result, "application[s] must contain 'full reports of investigations which have been made to show whether or not such drug is safe for use and whether such drug is effective in use.'"[13]

Once the FDA approves the pharmaceutical company's application,

6. 495 F.3d 695, 697 (D.C. Cir. 2007) (en banc).
7. 539 U.S. 558 (2003).
8. 495 F.3d at 697.
9. *See* Food, Drug, and Cosmetic Act, 21 U.S.C. § 355(a) (2006).
10. *See Abigail Alliance*, 495 F.3d at 697–98.
11. 21 U.S.C. § 355(a).
12. *Abigail Alliance*, 495 F.3d at 697 (quoting 21 U.S.C. § 355(d)(5)).
13. *Id.* (quoting 21 U.S.C. § 355(b)(1)(A)).

the drug must undergo several phases of clinical testing.[14] Human subjects are used for the first time in Phase I for the purpose of determining whether the drug is safe enough for additional human testing.[15] Phase II involves testing of an increased number of human subjects.[16] It is during this Phase that the testing is supposed to reveal the drug's efficacy as well as any side effects.[17] In Phase III, the testing involves hundreds or even thousands of human subjects for the purpose of "gather[ing] . . . additional information about effectiveness and safety that is needed to evaluate the overall benefit-risk relationship of the drug and to provide an adequate basis for physician labeling."[18]

The FDA generally restricts access to any drug that has not completed this lengthy testing process, even where the individual seeking access suffers from a terminal illness and has no other treatment options. Congress has, however, created a few small exceptions to this general rule. In particular, the FDA may allow an individual who is suffering from a life-threatening disease to access drugs that are still in clinical testing, where that individual has no serious alternatives for treatment.[19] The pharmaceutical companies, however, may not profit from these particular transactions.[20] Finally, the FDA may deny terminally ill individuals access to these drugs if there is "no 'reasonable basis' to conclude that the drug is effective[,] . . . or [if the drug poses an] 'unreasonable and significant additional risk of illness or injury.'"[21]

The Alliance found that this minor exception to the general rule was insufficient to meet the needs of its terminally ill members. Specifically, the Alliance asked the FDA to allow individuals to access experimental drugs after the completion of Phase I testing.[22] The FDA denied this request, concluding that it "would upset the appropriate balance that it [(the FDA)] is seeking to maintain, by giving almost total weight to the goal of early availability and giving little recognition to the importance of marketing drugs with reasonable knowledge for patients and physicians of their

14. On average, this testing process takes up to seven years. *See id.* at 698.

15. *See* 21 C.F.R § 312.21(a) (2007).

16. *See id.* § 312.21(b).

17. *Id.*

18. *Id.* § 312.21(c).

19. *See id.* § 312.34(b)(1)(i)–(ii). Additionally, the drug must be "under investigation in a controlled clinical trial," *id.* § 312.34(b)(1)(iii), and the drug's sponsor must be "actively pursuing marketing approval of the investigational drug with due diligence." *Id.* § 312.34(b)(1)(iv).

20. *See id.* § 312.7(d)(3). Drug companies may recover only those costs relating to "manufacture, research, development, and handling of the investigational drug." *Id.*

21. Abigail Alliance v. Eschenbach, 495 F.3d 695, 699 (D.C. Cir. 2007) (en banc) (quoting 32 C.F.R. § 312.34(b)(3)(i)).

22. *See id.*

likely clinical benefit and their toxicity."[23]

Because of the FDA's blanket rejection of its proposal, the Alliance sued the FDA, claiming that the lengthy investigation process for new drugs "amount[ed] to a death sentence for . . . terminally ill patients."[24] Specifically, the Alliance claimed that the narrow exception to the general rule prohibiting access to drugs still in clinical testing was not sufficient to provide terminally ill individuals with the access they needed to help save their lives.[25]

After the district court rejected the proposition that individuals have a right to access drugs not yet approved by the FDA,[26] a divided Court of Appeals for the D.C. Circuit reversed.[27] Writing for the majority, Judge Rogers found that the Due Process Clause of the Fifth Amendment[28] guarantees terminally ill individuals the right to access potentially life-saving drugs that have completed Phase I testing, where the terminally ill individuals have no viable alternative method of treatment.[29] Accordingly, Judge Rogers remanded the case back to the district court for the determination of whether the FDA's general prohibition of access to these drugs could pass constitutional muster under strict scrutiny review (i.e., whether the FDA's new-drug regulations were narrowly tailored to achieve a compelling government interest).[30]

The rest of the D.C. Circuit, however, would have none of this. After an en banc hearing, the court vacated Judge Rogers' opinion and held instead that terminally ill individuals do not have a fundamental right to ac-

23. *Id.* at 700.

24. *Id.*

25. *Id.*

26. *Id.*

27. Abigail Alliance v. Eschenbach (*Abigail I*), 445 F.3d 470, 486 (D.C. Cir. 2006), *reversed on reh'g* 495 F.3d 695, 697 (en banc).

28. The Due Process Clause of the Fifth Amendment, rather than the Fourteenth Amendment, applied in this case because it was the federal government that allegedly infringed on the right asserted by the Alliance. The Fourteenth Amendment's Due Process Clause applies in cases where individuals attack *state* action under a substantive due process theory. As a general matter, however, both clauses provide the same procedural and substantive guarantees. The only difference is whether the challenged government action originated at the state or federal level. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) ("We have long recognized that the [Fourteenth] Amendment's Due Process Clause, *like its Fifth Amendment counterpart*, guarantees more than fair process. [It] also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests.") (emphasis added) (internal quotations omitted). For the remainder of this Comment, any discussion of the protections guaranteed by the Due Process Clause of the Fourteenth Amendment apply equally to the Due Process Clause of the Fifth Amendment.

29. *Abigail I*, 445 F.3d at 486. In addition, Judge Rogers held that the access must be "informed," and that the terminally ill individual must be "mentally competent." *Id.*

30. *Id.*

cess potentially life-saving drugs.[31] In finding that no such fundamental right exists, the court invoked the substantive due process framework established in *Washington v. Glucksberg*.[32] According to *Glucksberg*, when courts are faced with the question whether the Due Process Clause of either the Fifth or Fourteenth Amendment protects an asserted right or liberty interest, they must consider (1) whether the right or liberty interest is, "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed"; and (2) whether the asserted right or liberty interest is stated with sufficient specificity.[33] Assuming that the Alliance's asserted right satisfied *Glucksberg*'s second requirement, the court engaged in a lengthy analysis of whether that right passed muster under the first inquiry.[34] Upon an examination of the history and legal traditions of the United States, the court found that the Alliance's asserted right for terminally ill individuals to access experimental pharmaceutical drugs for the purpose of saving their lives was not fundamental.[35] The court therefore subjected the FDA's new-drug regulations merely to rational basis review,[36] and, as a result, found that they did in fact bear a reasonable relationship to a legitimate government interest.[37] Accordingly, the court upheld the constitutionality of the FDA's regulations.[38]

II. THE DEVELOPMENT OF THE PROTECTION OF INDIVIDUAL RIGHTS AND LIBERTY INTERESTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The entire history of the Supreme Court's protection of individual rights and liberty interests under the Constitution is a lengthy one, and is beyond the scope of this Comment. It is, however, generally recognized that individual rights received heightened constitutional protection at the federal level after the ratification of the Fourteenth Amendment.[39] When

31. Abigail Alliance v. Eschenbach, 495 F.3d 695, 711 (D.C. Cir. 2007) (en banc).

32. 521 U.S. 702 (1997).

33. *Id.* at 720–21 (internal quotations omitted).

34. *Abigail Alliance*, 495 F.3d at 702–03. The court nonetheless expressed "serious doubt" as to whether the Alliance's asserted right would in fact satisfy the second requirement. In particular, the court found it "difficult to imagine how a right inextricably entangled with the details of shifting administrative regulations could be deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty." *Id.* at 702 n.6 (internal quotations omitted).

35. *Id.* at 703–11. For a closer analysis of the court's decision, *see infra* Part IV.

36. *Id.* at 712.

37. *Id.* at 712–13.

38. *Id.* at 713.

39. *See generally* RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF

discussing the constitutional protection of individual rights and liberty interests under the Fourteenth Amendment, two specific provisions come into play; namely, the Privileges or Immunities Clause and the Due Process Clause.[40] Although the Court has found that both of these clauses contain protections for substantive rights, the former has essentially been gutted of its original meaning.[41] Consequently, the Court has arguably expanded the reach of the Due Process Clause to protect those substantive rights originally meant to be within the ambit of the Privileges or Immunities Clause.[42]

A. The Privileges or Immunities Clause of the Fourteenth Amendment

The Privileges or Immunities Clause of the Fourteenth Amendment provides that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[43] There is substantial evidence in support of the notion that the privileges and immunities referenced in this Clause were meant to include, *inter alia*, the "civil rights" specified in the Civil Rights Act of 1866.[44] The leading case discussing the content of the terms "privileges" and "immunities" before the enactment of the Fourteenth Amendment is *Corfield v. Coryell*, where Justice Washington described them as:

> Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state . . .[45]

Justice Washington stated that "[t]hese, *and many others which might*

LIBERTY 192–223 (2004).

40. *See* U.S. CONST. amend. XIV, § 1.

41. *See infra* Part II.A.

42. *See infra* Part II.B.

43. U.S. CONST. amend. XIV, § 1.

44. BARNETT, *supra* note 39, at 60–68. The "civil rights" guaranteed by the Civil Rights Act of 1866 included the right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property." Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866). This Act applied to every citizen, regardless of race and color. *Id.*

45. 6 F.Cas. 546, 551–52 (C.C. E.D. Pa. 1823) (No. 3230). *See also* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 75 (1872) ("The first and the leading case on the [privileges and immunities of the citizens] is that of *Corfield v. Coryell* . . .").

be mentioned," are among the privileges and immunities secured to each citizen of the United States.[46]

Although the evidence seems clear that the purpose of the Privileges or Immunities Clause was to provide federal protection against infringement of these rights by state legislation, the Supreme Court essentially gutted the Clause of its original meaning in *Slaughter-House Cases*. The action in *Slaughter-House Cases* arose after the Louisiana legislature conferred a monopoly on the Slaughter-House Company for the purposes of "conducting and carrying on the live-stock landing and slaughter-house business."[47] The legislature further prohibited the slaughtering of animals at any slaughterhouse other than those of the Slaughter-House Company.[48] Various butchers of the New Orleans area whose businesses were placed in jeopardy by the establishment of this monopoly challenged the legislation as a violation of their rights guaranteed to them by the Privileges or Immunities Clause of the Fourteenth Amendment.[49]

Interpreting this Clause for the first time since the enactment of the Fourteenth Amendment, the Court distinguished between state citizenship and national citizenship.[50] It found that the Privileges or Immunities Clause, which refers only to the citizens of the United States, did not in fact provide federal protection for individual rights against infringement by state legislation.[51] Stated otherwise, the Fourteenth Amendment, according to the Court, did not provide federal protection for those privileges and immunities discussed by Justice Washington in *Corfield*.[52] Instead, those rights belonged to individuals as citizens of the several states;[53] as such, they could be infringed upon by the states without any Fourteenth Amendment violation.[54] Consequently, the Court found that the monopoly granted

46. *Corfield*, 6 F.Cas. at 552 (emphasis added).

47. 83 U.S. (16 Wall.) at 59.

48. *Id.*

49. *Id.* at 66.

50. *Id.* at 74.

51. *Id.*

52. *Id.* at 77–78.

53. *Id.* at 78.

54. Lest the Court leave the Privileges or Immunities Clause wholly devoid of any meaning, it suggested a few protections guaranteed by this Clause. Specifically, among those privileges and immunities guaranteed to individuals as citizens of the United States included the right "to come to the seat of government to assert any claim [one may have against it], to transact any business [one] may have with it, to seek its protection, to share its offices, [and] to engage in administering its functions." *Id.* at 79. Additionally, the Privileges or Immunities Clause guaranteed citizens of the United States the right to access seaports and to seek protection from the government when navigating the seas. *Id.* The Court in *Twining v. New Jersey* elaborated on the rights guaranteed to citizens of the United States under the this Clause. 211 U.S. 78, 97 (1908) ("[A]mong the rights and privileges of National citizenship recognized by this court are the right to pass freely from State to State; the right to petition Congress for a redress

to the Slaughter-House Company by the Louisiana legislature did not violate any rights protected by the Fourteenth Amendment.[55] The decision in *Slaughterhouse Cases* therefore effectively stripped the Privileges or Immunities Clause of it original meaning.

B. The Due Process Clause of the Fourteenth Amendment

With the Privileges or Immunities Clause essentially written out of the Fourteenth Amendment, it was not entirely clear whether courts had the ability to strike down legislation that infringed on individual rights and liberties. The Supreme Court's decision in *Slaughter-House Cases* removed the Fourteenth Amendment's primary vehicle for doing so. The Court therefore had to look elsewhere if it was to retain any power to scrutinize this type of legislation.

Accordingly, the Court began to invoke the Due Process Clause of the Fourteenth Amendment[56] to achieve the purpose originally attributed to the Privileges or Immunities Clause.[57] The advantage of using the Due Process Clause to protect individual rights and liberties is that the right to life, liberty, and property are expressly guaranteed. The problem, however, is the fact that the Due Process Clause seems to protect only *procedural* rights (i.e. rights to fair process), as opposed to substantive rights. Hence the negative implication that one's right to life, liberty, and property *may* be taken away as long as she receives due process of law.[58]

1. The *Lochner* Era's Protection of Individual Rights and Liberty Interests Under the Due Process Clause

Despite this textual difficulty, the Supreme Court consistently used the

of grievances; the right to vote for National officers; the right to enter the public lands; the right to be protected against violence while in the lawful custody of a United States marshal; and the right to inform the United States authorities of violation of its laws.") (internal citations omitted).

55. *Slaughter-House Cases*, 83 U.S. (16 Wall) at 82–83. Although a more detailed analysis of the original meaning of the Privileges or Immunities Clause is beyond the scope of this Comment, it seems clear that the majority essentially wrote the Clause out of the Fourteenth Amendment. As Justice Field stated in his dissenting opinion, the Privileges or Immunities Clause of the Fourteenth Amendment "was a vain and idle enactment, which accomplished nothing," if it did not include, *inter alia*, the civil rights guaranteed by the Civil Rights Act of 1866. *Id.* at 96–98 (Field, J., dissenting); *see also* BARNETT, *supra* note 39, at 192–203 (arguing that the majority in *Slaughter-House Cases* gutted the Privileges or Immunities Clause of its original meaning).

56. The Due Process Clause of the Fourteenth Amendment reads: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

57. BARNETT, *supra* note 39, at 206.

58. *Id.*; *see also* Lawrence v. Texas., 539 U.S. 558, 592 (2003) (Scalia, J., dissenting) ("The Fourteenth Amendment *expressly allows* States to deprive their citizens of 'liberty,' *so long as 'due process of law' is provided* . . .") (emphasis in original).

Due Process Clause after *Slaughter-House Cases* to strike down legislation that it found violated individual rights and liberties. For example, the Court used the Due Process Clause in *Pierce v. Society of Sisters* to strike down an Oregon statute that required parents to send their children to public schools.[59] The Court found that not only did this statute violate the liberty of parents to choose whether their children would receive a private or public education, but that it also infringed on the property interests of the private schools in Oregon, all of which would essentially be put out of business as a result of the statute.[60]

Similarly, in *Meyer v. Nebraska*, the Court struck down a Nebraska statute that prohibited the teaching of foreign languages to students before they graduated from the eighth grade.[61] Upon finding that the statute violated the liberty guaranteed by the Fourteenth Amendment,[62] the Court described that liberty as including not just:

> [F]reedom from bodily restraint[,] but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[63]

The Court's use of the Due Process Clause to strike down legislation that unnecessarily infringed on individual rights and liberties is perhaps best illustrated by *Lochner v. New York*,[64] a case which is disdained today by most legal scholars.[65] In *Lochner*, the Court struck down a New York statute that mandated a maximum sixty-hour work-week for bakers.[66] Though clothed as a health regulation, the Court found that the statute's "real object and purpose were simply to regulate the hours of labor between the master and his employees . . . in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of

59. 268 U.S. 510, 530, 534–35 (1925). The statute included exemptions "for children who are not normal, or who have completed the eighth grade, or who reside at considerable distances from any public school, or whose parents hold special permits from the County Superintendent." *Id.* at 531.

60. *Id.* at 534–35.

61. 262 U.S. 390, 397, 403 (1923).

62. *Id.* at 399, 402.

63. *Id.* at 399.

64. 198 U.S. 45 (1905).

65. *See* Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES MAGAZINE, Apr. 17, 2005, at 46 ("Today, the conventional wisdom among liberal and conservative legal thinkers alike is that *Lochner* was decided incorrectly and that the court's embrace of judicial restraint on economic matters in 1937 was a triumph for democracy."); *but see* RICHARD A. EPSTEIN, SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM 71, 73 (2003) (arguing that *Lochner* was correctly decided).

66. *Id.* at 46, 64.

the employees."[67] Quite simply, upon applying a more searching analysis than today's rational basis test,[68] the Court found that the New York statute violated the basic liberty of freedom of contract between an employee and an employer, and therefore violated the Due Process Clause of the Fourteenth Amendment.[69]

2. The Supreme Court's Retreat from the *Lochner* Era's Substantive Due Process Jurisprudence

The story of how the great transformation of constitutional law took place in the 1930s is beyond the scope of this Comment.[70] In short, contemporary scholarship demonstrates that the unraveling of the *Lochner* era[71] jurisprudence with respect to the constitutional protection of individual rights and liberties began with President Herbert Hoover's appointments to the Supreme Court in the early 1930s.[72] Essentially, Hoover's "appointees . . . softened the Court's constitutional objections to progressive legislation, which had the effect of further undermining the coherence of the Court's earlier restrictive doctrines."[73]

67. *Id.* at 57, 64.

68. As a general matter, the Supreme Court applies an extremely limited form of judicial review to legislation regulating economic activity (indeed, if any review at all). *See* Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it *might be thought* that the particular legislative measure was a rational way to correct it.") (emphasis added).

69. *Lochner*, 198 U.S. at 53. Justice Holmes famously dissented in *Lochner* based on his view that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*." *Id.* at 75 (Holmes, J., dissenting). Accordingly, Justice Holmes did not find convincing the free market-oriented opinion of the majority with respect to freedom of contract. But Justice Holmes' dissent in *Lochner* is confusing when read in conjunction with his First Amendment jurisprudence. Specifically, Justice Holmes was a strong advocate of the "marketplace of ideas" theory of free speech, which essentially holds that competition between differing ideas in an unregulated market for speech is the most efficient path to the truth. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In *Abrams*, Justice Holmes stated:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by the free trade in ideas—that the best of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Id.. It is hard to square Holmes' advocacy of markets for speech in *Abrams* with his rejection of markets for labor in *Lochner*.

70. *See generally*, Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1895 (1994) (arguing that President Hoover and Roosevelt's appointments to the Court was a primary factor in the transformation of constitutional law in the 1930s).

71. For the remainder of this Comment, I use "*Lochner* era" to refer to the period of time up to 1930s when the Court used the Due Process Clauses of the Fifth and Fourteenth Amendments to strike down legislation that violated individual rights and liberties.

72. *See* Friedman, *supra* note 70, at 1900–03; *see also* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution*: Lawrence v. Texas, *in* CATO SUPREME COURT REVIEW: 2002–2003 23–24 (James L. Swanson ed., 2003).

73. Barnett, *supra* note 72, at 23–24.

As the *Lochner* era justices gradually left the scene, the problem facing the Court during the time of this transformation was the question of how to uphold the constitutionality of progressive legislation that regulated the economic activity of individuals under the existing substantive due process framework, which essentially placed the burden on the government to justify certain infringements of individual liberty.[74] As Professor Randy Barnett makes clear, Justice Brandeis's majority opinion in *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*[75] set the stage for the Court's retreat from the *Lochner* era's substantive due process framework.[76] Of particular importance was the following language from Justice Brandeis's opinion:

> The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the *presumption of constitutionality* must prevail in the absence of some factual foundation of record for overthrowing the statute.[77]

The significance of this language cannot be overstated. By establishing that governmental legislation regulating economic activity was presumptively constitutional, the Court shifted the burden to individual plaintiffs to offer reasons why the legislation should be considered a violation of due process.

Of course, the initial presumption of constitutionality as established by Justice Brandeis in *Hartford Fire* did not mean that the Court automatically turned a blind eye toward such legislation; it was a rebuttable presumption. Indeed, just three years later the Court in *Borden's Farm Products Co. v. Baldwin* made just this point: "[the presumption of constitutionality] is a presumption of fact of the existence of factual conditions supporting the legislation. As such, it is a *rebuttable presumption*. It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault."[78]

The ability to rebut the presumption of constitutionality did not, however, remain intact. The Court's unraveling of the *Lochner* era substantive due process jurisprudence was completed in *West Coast Hotel v. Parrish*, which involved a challenge to the state of Washington's minimum wage

74. *See supra* Part II.B.1.
75. 282 U.S. 251 (1931).
76. *See* BARNETT, *supra* note 39, at 225–26.
77. *Id.* at 225–26 (quoting *Hartford Fire*, 282 U.S. at 257–58) (emphasis added).
78. 293 U.S. 194, 209 (1934) (emphasis added).

law for women and minors.[79] The Court took issue with the freedom of contract guaranteed by the Due Process Clause of the Fourteenth Amendment. After noting that the language "freedom of contract" is nowhere mentioned in the Constitution, the Court elaborated: "[l]iberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."[80] In upholding the constitutionality of the minimum wage law, the Court seemed to completely abdicate its power of judicial review. As the Court stated:

> What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that requirement of the payment of a minimum wage . . . is not an admissible means to that end?[81]

Based on this opinion, the Court seemed willing to uphold any state or federal legislation that was an admissible means to an appropriate end. Indeed, the Court in *West Coast Hotel* presumed that the evil at hand existed (apparently, below market wages), even in the absence of the slightest factual record for support.[82] Thus, the Court decided that it would no longer require the government to offer any evidence from which to infer that an evil at hand exists. These were purely legislative determinations, and courts, according to *West Coast Hotel*, had no business interfering. The doctrine of substantive due process as established in the *Lochner* era was, therefore, completely written off the books.

3. Contemporary Treatment of Substantive Due Process and the Protection of Individual Rights and Liberties Under the Constitution

The question remaining after *West Coast Hotel* was whether courts had any power at all to review state and federal legislation that arguably infringed on individual rights and liberties. The Supreme Court addressed this issue in *United States v. Carolene Products Co.*, which involved the

79. 300 U.S. 379, 386 (1937).

80. *Id.* at 391.

81. *Id.* at 398. This paternalistic reasoning is troubling, especially since "laws justified as protecting women have been a central means of oppressing them." Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1005 (1984). In particular, labor regulations such as maximum hour and minimum wage laws created specifically for women "helped create the sex segregated job market, with the more lucrative positions reserved for men . . . When women-only protective labor laws were in force, employers could completely disqualify women from jobs by defining a job as requiring overtime, night work, or heavy lifting. Maximum hour laws denied women higher paid overtime work . . . These protective laws gave women the option of staying at home or taking employment in lower paid, less desirable jobs." *Id.* at 959 n.14.

82. 300 U.S. at 399.

question whether the Filled Milk Act passed by Congress violated the Due Process Clause of the Fifth Amendment.[83] Specifically, the Filled Milk Act prohibited the shipment in interstate commerce of milk that was made with any fat or oil other than milk fat.[84] Although the Act was clearly special interest legislation that resulted in anticompetitive effects by favoring one group of producers over another,[85] the Court reasserted that such economic regulation is entitled to an essentially irrebuttable presumption of constitutionality:

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[86]

With an irrebuttable presumption of constitutionality in place for economic legislation, the Court needed to establish some doctrine by which it could scrutinize state and federal laws, "lest [the presumption of constitutionality] swallow the entire constitutional practice of judicial review."[87] The result was what is now known simply as the famous "Footnote Four."[88] Specifically, the Court's dicta in the fourth footnote of *Carolene Products* provides the basis for the modern treatment of the constitutional protection of individual rights.[89] In Footnote Four, the Court allowed a "narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments."[90] By allowing for

83. 304 U.S. 144, 145–47 (1938).

84. *Id.* at 145–46.

85. *See generally*, Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 398–99 (1987) (arguing that the result of the Court's decision in *Carolene Products* to uphold the constitutionality of the Filled Milk Act "was to expropriate the property of a lawful and beneficial industry; to deprive working and poor people of a healthful, nutritious, and low-cost food; and to impair the health of the nation's children by encouraging the use as baby food of a sweetened condensed milk product that was 42% sugar").

86. *Carolene Products*, 304 U.S. at 152. *See also* Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

87. BARNETT, *supra* note 39, at 229.

88. *See* Miller, *supra* note 85, at 397 ("*United States v. Carolene Products Corporation* [sic], as any second year law student knows, contains perhaps the most renowned footnote in constitutional history.").

89. BARNETT, *supra* note 39, at 230.

90. *Carolene Products*, 304 U.S. at 152 n.4. The Court makes this assertion seemingly without much thought, for the Ninth Amendment does not in fact contain a "specific prohibition." Rather, as it

judicial review of only those rights explicitly mentioned in the Bill of Rights (the "Footnote Four framework"), the Court in *Carolene Products* took the first steps toward a fundamental/non-fundamental rights dichotomy that continues to this day under the Court's conception of constitutional rights.[91]

The problem with the application of the Footnote Four framework was illustrated in *Griswold v. Connecticut*, where the Court struck down a Connecticut statute that criminalized the use of contraceptives.[92] Under the Footnote Four framework, the Court clearly had no authority to strike down the law, as nothing in the Bill of Rights expressly protects a fundamental right (i.e. a right expressly guaranteed by the Bill of Rights) to use contraceptives. The Court was therefore faced with at least the following four options: (1) adhere strictly to the Footnote Four framework and uphold the Connecticut statute; (2) invoke the *Lochner* era substantive due process doctrine to strike down the statute; (3) use the Ninth Amendment to strike down the statute; or (4) construe the Bill of Rights in a way that allows for striking down the statute while at the same time upholding the Footnote Four framework.

In his famous (perhaps infamous) opinion, Justice Douglas chose the fourth option. Specifically, he construed a few provisions of the Bill of Rights in a way to support a general right of privacy.[93] For example, Douglas found that "the First Amendment has a penumbra where privacy is protected from governmental intrusion."[94] Additionally, Douglas invoked the Third, Fourth, and Fifth Amendments[95] as further support that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[96] Accordingly, Douglas found that the contraceptive law was unconstitutional because it violated this right of privacy.[97]

Importantly, Justice Douglas understood that he was walking a tight line—on the one hand, Footnote Four seemed to restrict the Court's ability

reads, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. Though the interpretation of the Ninth Amendment is beyond the scope of this Comment, its language suggests a serious error by the Court to assume that only those rights that are specifically enumerated deserve a higher level of scrutiny.

91. *See* BARNETT, *supra* note 39, at 230.

92. 381 U.S. 479, 480, 485 (1965).

93. *Id.* at 483–86.

94. *Id.* at 483.

95. In particular, Justice Douglas referred to the Fifth Amendment's Self-Incrimination Clause. *Id.* at 484.

96. *Id.*

97. *Id.* at 485–86.

to strike down such a repugnant law; on the other hand, striking down that law as violative of individual rights would seem to revive the *Lochner* era substantive due process jurisprudence. Indeed, Justice Douglas expressly recognized this dilemma:

> Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation . . . We do not sit as a superlegislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.[98]

In all likelihood, therefore, Justice Douglas's refusal to use the Due Process Clause of the Fourteenth Amendment to strike down the Connecticut statute was a result of his reluctance to use a methodology even remotely similar to the type found in the *Lochner* era. Thus, the right of privacy emanating from a few provisions of the Bill of Rights was born. For the purposes of this Comment, the most important contribution made by *Griswold* is not the Court's ultimate holding that the contraceptive law was unconstitutional, but rather the fact that for the first time since *Carolene Products* the Court upheld a "fundamental" right—privacy—not expressly mentioned in the Bill of Rights.[99]

Although Justice Douglas avoided the use of the Due Process Clause in providing protection for a "fundamental" right not expressly mentioned in the Bill of Rights, the Court in *Roe v. Wade* expressly stated that the right of privacy is in fact included within the liberty guaranteed by the Due Process Clause.[100] Subsequent cases have relied on this "fundamental rights" methodology to find that the Due Process Clause also protects additional rights not expressly mentioned in the Constitution.[101] Today, courts invoke the two-pronged standard established in *Washington v. Glucksberg*—i.e. (1) whether the right is, "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty"; and (2) whether the asserted right is stated with sufficient specificity—to determine whether the right is sufficiently fundamental to receive constitutional protection.

98. *Id.* at 481–82 (internal citations omitted).

99. BARNETT, *supra* note 39, at 232.

100. 410 U.S. 113, 152–53 (1973).

101. *See, e.g.*, Planned Parenthood of Southeastern Pennsylvania. v. Casey, 505 U.S. 833, 846–47, 879 (1992) (fundamental right to abortion); Carey v. Population Services Int'l, 431 U.S. 678, 688–89 (1977) (fundamental right to decide whether to bear children); Loving v. Va., 388 U.S. 1, 12 (1967) (fundamental right to marriage).

III. *LAWRENCE V. TEXAS*: A POSSIBLE SHIFT IN THE SUPREME COURT'S TREATMENT OF INDIVIDUAL RIGHTS UNDER THE DUE PROCESS CLAUSES

Just as the methodology used in *Griswold* was more important than the particular outcome, the Court's more recent decision in *Lawrence v. Texas*[102] is significant for similar reasons. In particular, *Lawrence* marks yet another shift away from the strict Footnote Four framework established in *Carolene Products*. Whether the methodology adopted in *Lawrence* will be extended to future substantive due process cases is still up in the air.

In *Lawrence*, the Supreme Court addressed the constitutionality of a Texas statute that prohibited homosexual conduct, even between two consenting adults within the privacy of their own home.[103] The case arose after two Texas police officers who were investigating a weapons charge entered an apartment and found two men engaged in a sexual act.[104] The officers arrested both men and charged them with "deviate sexual intercourse . . . with a member of the same sex," in violation of the Texas statute.[105] At issue before the Court was whether the statute violated the Due Process Clause of the Fourteenth Amendment.[106] Standing in the Court's way to finding the statute unconstitutional was *Bowers v. Hardwick*, which, decided just seventeen years earlier, upheld the constitutionality of a state anti-sodomy statute.[107]

In an opinion authored by Justice Kennedy, the Court overruled *Bowers* and held that the Texas statute violated the Due Process Clause of the Fourteenth Amendment.[108] The potentially transformative aspect of the opinion lies in the Court's refusal to invoke *Glucksberg*'s strict substantive due process standard. Quite simply, the Court declined to consider whether the right to engage in homosexual conduct is a fundamental right that is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed."[109] Instead, the Court simply discussed the "liberty"

102. 539 U.S. 558 (2003).

103. *Id.* at 562–63.

104. *Id.* at 562–63.

105. *Id.* at 563.

106. *Id.* at 564.

107. 478 U.S. 186, 196 (1986). The Court in *Bowers* found that the anti-sodomy statute did not violate the Due Process Clause of the Fourteenth Amendment. *Id.*

108. *Lawrence*, 539 U.S. at 578.

109. 521 U.S. 702, 721 (1997) (internal citations omitted). *But see Bowers*, 478 U.S. at 190 (stating that the issue before the Court was "whether the Federal Constitution confers a fundamental right upon

protected under the Due Process Clause[110] and placed the burden on the state to justify this restriction of liberty.[111] Perhaps the most important language in *Lawrence* comes at the end of the opinion, where Justice Kennedy observed:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[112]

This type of language signals Justice Kennedy's understanding that the Framers of the Fifth and Fourteenth Amendments would not have presumed to know *a priori* the full range of liberties guaranteed to each individual under the Due Process Clauses. In this way, Justice Kennedy's reasoning bears a striking similarity to many of the Framers' view that individual rights and liberties are incapable of enumeration.[113]

The methodology in *Lawrence* of simply presuming that the liberty protected by the Due Process Clause guarantees individuals the right to choose their own personal relationships free of government interference brought the Court one step closer toward dissolving the Footnote Four framework. In essence, *Lawrence* seemed to indicate that the Court was at least open to the idea of returning to a more traditional substantive due process methodology; namely, the type of methodology exemplified by the

homosexuals to engage in sodomy").

110. *Lawrence*, 539 U.S. at 564 (stating that the Due Process Clause of the Fourteenth Amendment has a substantive component that protects an individual's liberty).

111. *Id.* at 571 ("The issue is whether the majority may use the power of the State to enforce [its own moral] views on the whole society through operation of the criminal law.").

112. *Id.* at 578–79.

113. *See* BARNETT, *supra* note 39, at 56–57. Specifically, one of the members of the Constitutional Convention, James Wilson, stated:

> In all societies, there are many powers and rights, which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete.

Id. at 56. Similarly, as future Supreme Court Justice James Irdell stated, "[l]et any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it." *Id.* at 57. Both of these statements were made in opposition to adding the Bill of Rights to the Constitution. The argument was that such an enumeration of rights would necessarily imply that all other claims to rights or liberties were sacrificed to the government. Accordingly, the government would then be free to infringe on all other rights not specifically enumerated in the Constitution. Indeed, this was such a forceful argument that James Madison himself stated that "[t]his is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system." *Id.* at 224.

Lochner era. Though it is unclear whether the Court will extend the reasoning and methodology of *Lawrence* to future constitutional rights cases, *Abigail Alliance v. Eschenbach* is a perfect example of a case that essentially cries out for the *Lochner* era treatment.

IV. THE FAILURE OF THE CURRENT SUBSTANTIVE DUE PROCESS FRAMEWORK TO APPRECIATE THE SIGNIFICANCE OF THE LIBERTY INTEREST AT STAKE IN *ABIGAIL ALLIANCE V. ESCHENBACH*

As stated above, the Supreme Court's current substantive due process framework involves a two-fold inquiry for the determination of whether an asserted right is fundamental. First, courts must consider whether the asserted right or liberty interest is, "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed."[114] Second, the asserted right or liberty interest must be stated with sufficient specificity (the "specificity requirement").[115] Although the first prong of this test is certainly rife with problems,[116] this Comment focuses on the propriety of the specificity requirement. In particular, the flaws of the specificity requirement are on clear display in *Abigail Alliance*. Perhaps no recent substantive due process case more clearly illustrates how this requirement devalues the significance of the liberty at stake. Additionally, it is possible even outside the context of the *Abigail Alliance* decision to see how the specificity requirement will almost always lead courts to conclude that an asserted right or liberty interest is not fundamental. Finally, the court's stringent focus in *Abigail Alliance* on the specificity requirement blinds it to perhaps the most significant argument in favor of the Alliance's asserted right—namely, the textual anchor in the Due Process Clause of the right to life.

114. *Glucksberg*, 521 U.S. at 720–21 (internal citations omitted).

115. *Id.* at 721.

116. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989). Although *Michael H.* was decided before *Glucksberg*, Justice Scalia applied essentially the same language of the first prong of the *Glucksberg* formulation in holding that a natural father did not have any parental rights under the Due Process Clause of the Fourteenth Amendment because his child was conceived as a result of an adulterous affair that he had with a married woman. *Id.* at 113–14, 126–27. In so holding, Justice Scalia found it particularly important (indeed, controlling) that there was no specific tradition in this Nation's history of protecting the rights of parents who beget children outside the traditional unitary family. *Id.* at 124. *See also* J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1615–18 (1990) (criticizing Justice Scalia's view in *Michael H.* that protection of rights under the Due Process Clause requires a specific, historical tradition).

A. *The Effect of the Specificity Requirement*

In *Lawrence*, Justice Kennedy rightly recognized that a requirement of a highly specific formulation of an asserted right can often fail "to appreciate the extent of the liberty at stake."[117] Indeed, the statute at issue in *Lawrence* actually punished individuals as criminals simply for engaging in certain types of personal relationships[118] that should have been within their liberty to choose in the first place. The FDA's new-drug regulations share a repugnant quality similar to the statute in *Lawrence.* In essence, the effect of the FDA's restriction of access for terminally ill patients to potentially life-saving drugs is, as the Alliance points out, a "death sentence,"[119] and the attempt by the majority in *Abigail Alliance* to state the asserted right with such specificity fails to take into account the magnitude of the liberty at stake. Nowhere in the majority's opinion does the court acknowledge the severity of these individuals' life-threatening illnesses, even though the Alliance made clear that they have no viable alternatives for treatment.[120]

Additionally, the court's relentless focus on *Glucksberg*'s specificity requirement causes it to formulate the right differently in separate instances of the opinion. For example, the court initially states the Alliance's asserted right as follows:

> Whether the liberty protected by the Due Process Clause embraces the right of a terminally ill patient with no remaining approved treatment options to decide, in consultation with his or her own doctor, whether to seek access to investigational medications that the FDA concedes are safe and promising enough for substantial human testing.[121]

Yet later in its opinion, the court transforms this asserted right into one about whether individuals have the right to assume "enormous risks . . . in pursuit of *potentially* life-saving drugs."[122] Notably, in neither of these formulations does the court even once mention the significance of the liberty interest sought by the Alliance members. That is, while the court struggles to adhere to a strict interpretation of the specificity requirement, the real issue is simple: whether terminally ill individuals have the right to access certain medical treatments that could potentially save their lives. Again, just as Justice Kennedy recognized in *Lawrence*, defining a right

117. *See* 539 U.S. at 566–67.

118. *Id.* at 563.

119. Abigail Alliance v. Eschenbach, 495 F.3d 695, 700 (D.C. Cir. 2007) (en banc).

120. *Id.* at 699.

121. *Id.* at 701.

122. *Id.* at 710 (emphasis in original). Importantly, the court rephrases the asserted right to suit its own argument that the doctrine of self-defense did not support the Alliance's position. *See id.* at 709–10.

with such specificity actually denigrates the liberty interest at stake.

In her dissent in *Abigail Alliance*, Judge Rogers also identifies the majority's error in adhering to a rigid interpretation of the specificity requirement. Although Rogers, like the majority, believes that the *Glucksberg* framework is controlling, she does not make the mistake of concluding that the specificity requirement prohibits courts from inferring a broader right to the underlying asserted liberty interest.[123] Indeed, "were it impermissible to draw any inferences from a broader right to a narrower right, nearly all of the Supreme Court's substantive due process case law would be out of bounds."[124] Accordingly, Rogers points out that the real question is whether the Constitution protects a fundamental right to preserve one's life.[125] It is only after making this determination that the court should have then discussed whether "the risks associated with [preserving one's life] justify restraining that right."[126] In essence, according to Judge Rogers, the majority completely turns this inquiry on its head. Rather than determining whether a broad right to preserve one's life is fundamental, the court immediately specified the right with the highest detail possible (which included the risks associated with preserving one's life), and consequently found that it did not qualify as fundamental. It is exactly this problem with the specificity requirement that causes courts such difficulty in identifying rights and liberty interests that do in fact qualify as fundamental.

In *Raich v. Gonzales*, for example, plaintiff Angel McClary Raich sought a declaratory judgment that the Controlled Substances Act (CSA)[127] was unconstitutional as applied to her.[128] Specifically, Raich used medicinal marijuana to treat numerous serious illnesses, "including an inoperable brain tumor, a seizure disorder, life-threatening weight loss, nausea, and several chronic pain disorders."[129] For Raich, marijuana was the only treatment out of nearly three dozen options that adequately treated her symptoms.[130] Every other available treatment option "utterly failed."[131]

123. *Id.* at 716 (Rogers, J., dissenting).

124. *Id.* (Rogers, J., dissenting). For example, Judge Rogers cites *Roe v. Wade*, 410 U.S. 113 (1973), which inferred abortion rights from a right to privacy, and *Moore v. East Cleveland*, 431 U.S. 494 (1977), which "extrapolate[ed a] specific right to determine extended family living arrangements from [a] broader constitutional protection for the sanctity of the family." *Abigail Alliance*, 495 F.3d at 716 (Rogers, J., dissenting).

125. *Id.* (Rogers, J., dissenting).

126. *Id.* (Rogers, J., dissenting).

127. 21 U.S.C. §§ 801–971 (2006).

128. 500 F.3d 850, 855–56 (9th Cir. 2007).

129. *Id.* at 855.

130. *Id.*

131. *Id.* (internal citation omitted).

Raich thus claimed that the CSA violated her right to use marijuana for medicinal purposes under the Due Process Clause of the Fifth Amendment.[132] Invoking *Glucksberg*'s specificity requirement, the court analyzed Raich's liberty interest as she framed it—namely, the right to "make life-shaping medical decisions that are necessary to preserve the integrity of her body, avoid intolerable physical pain, and preserve her life."[133] Although on its face this description seems reasonably specific, and in fact even mirrors fundamental rights that the Supreme Court has previously recognized,[134] the court found that Raich's asserted right failed to meet the specificity requirement because it omitted the word "marijuana." Accordingly, the court found it necessary to reformulate Raich's asserted right into "whether the liberty interest specially protected by the Due Process Clause embraces a right to make a life-shaping decision on a physician's advice to use medical marijuana to preserve bodily integrity, avoid intolerable pain, and preserve life, when all other prescribed medications and remedies have failed."[135] With the addition of the word "marijuana" included in the description, the court found that the right was not fundamental in part because of the CSA, which did not allow for any exceptions to the prohibition of controlled substances.[136]

The important aspect of *Raich* is not the court's ultimate holding that medicinal use of marijuana is not a fundamental right, but rather *how* the court reached this decision. For example, before reformulating Raich's asserted right to include the word "marijuana," the court seemed to indicate the validity of Raich's liberty interest as she originally framed it. In particular, the court noted that Raich's asserted right to use available medicinal treatments to avoid pain and preserve her life had considerable support from the Supreme Court.[137] It was only after strictly adhering to *Glucksberg*'s specificity requirement (just as the majority did in *Abigail Alliance*) that the court deemed Raich's asserted right as non-fundamental.[138] For the

132. *Id.* at 856.

133. *Id.* at 864.

134. *See id.*

135. *Id.*

136. *See id.* at 865–66.

137. *See id.* at 864. Specifically, the court found that *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Planned Parenthood of Southeastern Pennsylvania. v. Casey*, 505 U.S. 833 (1992) supported Raich's right to use medicinal marijuana because of their emphasis on an individual's right to autonomy and bodily integrity. *Raich*, 500 F.3d at 864.

138. *See also* Washington v. Glucksberg, 521 U.S. 702, 722–23 (1997) (reformulating the asserted "right to die" into "whether the 'liberty' specially protected by the Due Process Clause includes a *right to commit suicide which itself includes a right to assistance in doing so*") (emphasis added); Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 277, 279 (1990) (reformulating the asserted "right to die" into "a constitutionally protected right to refuse lifesaving hydration and nutrition").

purposes of this Comment, the overriding lesson of *Raich* is its illustration of how *Glucksberg*'s specificity requirement essentially forces courts to formulate an asserted right or liberty interest in a way that can almost never be considered "fundamental."[139]

Logically, of course, it is easy to see that rights or liberty interests described with such specificity will almost never be considered fundamental. For example, few would question (with the possible exception of Justice Scalia) a parent's constitutional right to send her children to a private school.[140] Recall that the Supreme Court in *Pierce v. Society of Sisters* struck down the Oregon statute requiring parents to send their children to public schools.[141] The Court held that this statute violated the liberty protected by the Due Process Clause of the Fourteenth Amendment.[142]

But what would happen if this was a new issue facing the courts today? Presumably the specificity requirement would make all the difference in the world. Consider, for example, a parent who asserted that she had the right to send her children—whose names are Ozzie and Harriet; who descend from German, Welsh, and Italian heritages; who are exactly three years apart in age; where one prefers mathematics, the other literature—to a non-religious, private school. With this level of specificity, it is difficult to see how a court could find any such established tradition "deeply rooted in this Nation's history" that would support a finding that this parent's asserted right was "fundamental." Had this level of specificity been required in *Pierce*, the general right to send one's children to private schools might not be protected today.[143] The point that this example makes clear is that

139. Despite its ruling, it is clear that the court at least recognized the magnitude of Raich's asserted liberty interest, as opposed to the majority in *Abigail Alliance*. *See Raich*, 500 F.3d at 859 n.6 ("The seriousness of her conditions cannot be overemphasized . . . . Raich has shown remarkable fortitude in pursuing this action to *vindicate the rights of the infirm* despite her precarious physical condition.") (emphasis added); *id.* at 861 n.9 ("We cannot ignore that the unusual circumstances of this case raise the danger of acute preconviction harms. The arrest of Raich or her suppliers, or the confiscation of her medical marijuana would cause Raich severe physical trauma.").

140. *See* Troxel v. Granville, 530 U.S. 57, 92 (Scalia, J., dissenting) (questioning the legal foundation of *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

141. 268 U.S. 510, 530 (1925).

142. *Id.* at 534–35. This case was, of course, decided in the *Lochner* era, where the Court was not constrained in any way by a "specificity requirement." The only question relevant to the Court was whether the statute simply violated the "liberty" protected by the Due Process Clause.

143. *See also* Balkin, *supra* note 116, at 1615. Balkin criticized Justice Scalia's opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) by pointing out that:

> [U]nder his test, there has been no established tradition in California for protecting Justice Scalia's own rights to visit his children, since there is no tradition of affording protection to fathers who are children of Italian immigrants and who graduated from Ivy League law schools before 1965, were appointed to the United States Supreme Court by former governors of the state of California and have more than two children but less than thirteen.

Id.

the specificity requirement always reduces the likelihood (to zero in many cases) that asserted rights or liberty interests will be protected under the Due Process Clauses of either the Fifth or Fourteenth Amendments.

B. The Due Process Clause's Textual Anchor in the Right to Life and the Common Law's Tradition of Recognizing the Right to Preserve One's Life

Even setting aside the arguments suggesting the impropriety of *Glucksberg*'s specificity requirement, the court in *Abigail Alliance* makes an enormous error in its attempt to discover whether the Alliance's asserted right is fundamental. Quite simply, the court overlooks the textual anchor in both Due Process Clauses of the right to *life*.[144] One might reasonably ask whether this right to life has any meaning at all if it does not even protect the right to preserve or prolong one's own life. Seemingly blind to the text of the Due Process Clause, the court argues that rather than this being a case about the right to save one's life, it "is about the right to access experimental and unproven drugs in an attempt to save one's life."[145] Again, the court's unwavering adherence to a strict interpretation of *Glucksberg*'s specificity requirement shields it from the real constitutional issue at stake.

As Judge Rogers makes clear in her dissent, the common law has always recognized an individual's right to save her own life.[146] Specifically, the right of self-defense is deeply rooted in the common law,[147] and although it is generally applied in cases where one individual repels violence from another individual, there is nothing about the doctrine that would preclude its application to a "diseased cell within one's body."[148] Indeed, the Supreme Court has already recognized on two separate occasions the right of a mother to abort her fetus if the pregnancy threatens her life.[149] This right applies regardless of whether the fetus is viable.[150] Furthermore, the Court has distinguished this particular right to abortion from the more controversial, reproductive right to abortion.[151]

Just as a woman may protect her life from a threatening fetus, why

144. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

145. Abigail Alliance v. Eschenbach, 495 F.3d 695, 701 n.5 (D.C. Cir. 2007) (en banc).

146. *Id.* at 717–19 (Rogers, J., dissenting).

147. Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1817–18 (2007).

148. *Abigail Alliance*, 495 F.3d at 718 (Rogers, J., dissenting). Notably, courts recognize the self-defense doctrine even in cases where an individual uses violence to repel an animal attack. *Id.* at 718 n.3 (Rogers, J., dissenting); Volokh, *supra* note 147, at 1817.

149. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992); Roe v. Wade, 410 U.S. 113, 163–64 (1973).

150. Volokh, *supra* note 147, at 1824.

151. *Id.*

should a terminally ill individual not also have the right to thwart a life-threatening diseased cell?[152] Functionally, what is the difference between a life-threatening fetus and a group of life-threatening cells? Indeed, "if people may protect their lives even by taking a viable fetus's life or an attacker's life, they should be equally free to risk their own short remaining lives in trying to lengthen their lives."[153]

In addition to the longstanding recognition of the right to self-defense, the necessity doctrine at common law also supports an individual's right to save her life from life-threatening diseased cells. For example, the court in *Raich v. Gonzales* found that the necessity doctrine supported Raich's asserted right to use medicinal marijuana.[154] In general, necessity allows an individual to violate a law if doing so is "the lesser of two evils."[155] For a common law necessity defense to stand, courts require the individual to show:

> (1) that he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law.[156]

The court in *Raich* found that all of these elements were satisfied. To start, Raich easily met the first requirement, as she was clearly faced with a choice of two evils: either violate the CSA and use marijuana to relieve her pain, or abide by the CSA and "endure excruciating pain and possibly death."[157] Raich also satisfied the second element, as not even the Government contested the notion that she used marijuana to prevent imminent harm to her body.[158] Additionally, Raich "clearly demonstrated the medical correlation" between her use of marijuana and the harm she sought to avoid, as the Government again did not make any argument in opposition.[159] Thus, the court found that Raich satisfied the third element.[160] Finally, because Raich and her doctor had exhausted all other legal

152. *See also id.* at 1828. ("why should a woman be free to use a gun to try killing an attacking grizzly bear . . . but not a drug to try killing an attacking bacterium or cell?").

153. *Id.* at 1829.

154. 500 F.3d 850, 859 (9th Cir. 2007).

155. *Id.* at 858.

156. *Id.* at 859.

157. *Id.* at 858. As her doctor testified at trial, without using marijuana Raich would be forced to "endure intolerable pain including severe chronic pain in her face and jaw muscles due to temporomandibular joint dysfunction and bruxism, severe chronic pain and burning from fibromyalgia that forces her to be flat on her back for days, excruciating pain from non-epileptic seizures, heavy bleeding and severely painful menstrual periods due to a uterine fibroid tumor, and acute weight loss resulting possibly in death due to a life-threatening wasting disorder." *Id.* at 859.

158. *Id.* at 860.

159. *Id.*

160. *Id.*

alternative treatments to her medical problems, the court found that she had satisfied the remaining element.[161]

Taken together, the long history of the common law doctrines of self-defense and necessity strongly support the notion that the Constitution's explicit protection of the right to life includes the right to preserve one's life. The majority's failure in *Abigail Alliance* to even recognize the textual anchor for this right should thus cast serious doubt on the adequacy of its decision.

In sum, by adhering to such a rigid interpretation of *Glucksberg*'s specificity requirement, the majority in *Abigail Alliance* failed to understand the magnitude of the liberty interest at stake. This adherence even shielded the court from taking notice of the Due Process Clause's protection of the right to life. Most importantly for the purposes of this Comment, the two-pronged standard of *Glucksberg* that is on clear display in *Abigail Alliance* illustrates how the current substantive due process framework actually forces courts (in most cases) to abdicate entirely their constitutional role of scrutinizing government legislation that infringes on individual rights and liberty interests,[162] which, unfortunately for the Alliance members, means that "the right to try to save one's life is left out in the cold."[163]

V. APPLICATION OF THE *LAWRENCE* FRAMEWORK TO *ABIGAIL ALLIANCE*

Given the problems with both the propriety of the specificity requirement as well as its actual application to the Alliance's asserted right, the court in *Abigail Alliance* should have used a *Lawrence* framework to review the constitutionality of the FDA's new-drug regulations. Although one could argue that *Lawrence*'s methodology is limited solely to the issue in that case, the Supreme Court has never disapproved of an extension of *Lawrence* to other constitutional rights issues. Indeed, Justice Kennedy's language in *Lawrence* provides ample support for courts to extend its reasoning to additional substantive due process cases. Recall that Justice Kennedy made clear that a highly specific formulation of the asserted right or liberty interest at stake often overlooks the importance of that right.[164] Per-

161. *Id.* Despite Raich's apparent satisfaction of each of these four elements, the court ultimately found that, on procedural grounds, her necessity defense could not result in a prospective injunction to enjoin the Government from enforcing the CSA against her. *See id.* at 861.

162. *See* Abigail Alliance v. Eschenbach, 495 F.3d 695, 722 (D.C. Cir. 2007) (en banc) (Rogers, J., dissenting) ("To deny the constitutional importance of the right to life and to attempt to preserve life is to move from judicial modesty to judicial abdication.").

163. *Id.* at 715 (Rogers, J., dissenting).

164. Lawrence v. Texas, 539 U.S. 558, 566–67 (2003).

haps even more importantly, Justice Kennedy concluded his opinion with the assertion that the Framers of the Due Process Clauses of both the Fifth and Fourteenth Amendments could not have known in advance all of the rights and liberties protected by these clauses.[165] In short, "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[166]

This language, at a minimum, suggests that *Lawrence* indicated a shift in the Court's methodology for the protection of individual rights and liberties under the Due Process Clauses. Thus, lower courts should not hesitate to apply *Lawrence*'s framework to future substantive due process cases, especially when the right or liberty interest is as fundamental as the one asserted by the Alliance—namely, the right to save one's own life.

With respect to the facts of *Abigail Alliance*, it is not surprising that using the *Lawrence* framework to review the constitutionality of the FDA's new-drug regulations would involve a much different analysis than the highly rigid standard expounded in *Glucksberg*.

To start, the Alliance members would not be required to state their asserted right with a high degree of specificity. That is, the Alliance would not need to frame the issue with the detailed precision required by the majority in *Abigail Alliance*.[167] Instead, the relevant issue would simply be whether the liberty protected by the Due Process Clause of the Fifth Amendment guaranteed an individual's right to save her own life. And, importantly, the *Lawrence* framework would presume that individuals do in fact have this right, and therefore would require the FDA to show that its regulations were narrowly tailored to achieve a compelling government interest.

The likely result under a *Lawrence* framework would be a finding that the FDA's new-drug regulations fail to survive strict scrutiny analysis. Given the clear textual anchor of the right to life in the Due Process Clause, coupled with the common law doctrines of self-defense and necessity, it is hard to imagine a scenario where the FDA could in fact rebut the presumption in favor of liberty. Most importantly, the application of the *Lawrence* framework to the Alliance's asserted right would further dissolve the presumption of constitutionality and "fundamental rights" analysis in general. In short, the extension of the *Lawrence* framework to additional substantive due process cases would tip the balance back in favor of liberty, a disposition which has been seriously lacking since the *Lochner* era.

165. *Id.* at 578–79.
166. *Id.* at 579.
167. *See supra* Part IV.A.

CONCLUSION

In closing, the Supreme Court's current substantive due process doctrine as formulated in *Glucksberg* is the result of decades of significant misinterpretation of the Constitution with respect to the protection of individual rights and liberties. The progressives appointed to the Court during the late 1920s and 1930s began this misinterpretation by abandoning the *Lochner* era's method of judicial review of legislation under the Due Process Clauses of the Fifth and Fourteenth Amendments. Instead of a presumption in favor of individual rights and liberty, the Court adopted a rebuttable presumption of constitutionality. But even this intermediate level of review did not last. With its decision in *West Coast Hotel*, the Court essentially made the presumption of constitutionality irrebuttable. Then, wholly out of thin air, the Court in *Carolene Products* allowed for a higher level of judicial review only for those rights specifically enumerated within the first ten amendments.[168]

After two decades of the *Carolene Products* framework, *Griswold* set the stage for a new era of constitutional rights jurisprudence. In violation of a strict interpretation of Footnote Four, the Supreme Court recognized a fundamental right to privacy nowhere expressly mentioned in the first ten amendments. Instead, the Court found that this right to privacy emanated from the penumbras of specific provisions of the Bill of Rights. Thus, *Griswold* established the precedent by which courts are to protect only those rights that *they* deem "fundamental."

The Supreme Court has also refined its treatment of substantive due process since *Griswold*. Specifically, before courts can exact a higher level of scrutiny of state and federal legislation, not only must the right asserted be deeply rooted in this Nation's history, but it also must stated with sufficient specificity. Combined, these two requirements make it all the more likely that any asserted right or liberty interest will be considered non-fundamental, and therefore subject merely to rational basis review.

It was not until Justice Kennedy's decision in *Lawrence* that the Court breathed new life into the more traditional method of protecting individual rights and liberties under the Due Process Clauses of the Fifth and Fourteenth Amendments. Justice Kennedy correctly discarded the Court's entire post-*Lochner* era method of judicial review of legislation under these clauses. In particular, he understood that requiring asserted rights and lib-

168. *See* Roger Pilon, *Foreward: Substance and Method at the Court*, *in* CATO SUPREME COURT REVIEW: 2002–2003 xi (James L. Swanson ed., 2003) (stating that the new constitutional rights methodology employed by the post-*Lochner* era Court in the 1930s was simply "invented . . . from whole cloth").

erty interests to be stated with a high degree of specificity actually diminishes their importance. Additionally, Justice Kennedy acknowledged that, in fact, it is essentially impossible to enumerate and define all of the rights protected by the Due Process Clauses. Because of this problem, he simply presumed that the liberty guaranteed by these clauses protected an individual's right to engage in personal relationships free from government interference. The onus, for once, was on the state to justify its infringement on individual liberty. There was no discussion of whether this liberty interest was a fundamental right. And, as the outcome of *Lawrence* demonstrates, there was simply no need to engage in such analysis, as the true purpose of the statute was to impose one particular view of morality onto an entire people, some (or many) of whom might squarely reject it.

Based on *Lawrence* alone, the Court now has solid precedent on which to retreat from the presumption of constitutionality. In future substantive due process cases, the Court is free simply to presume that individual liberty is guaranteed under the Due Process Clauses of the Fifth and Fourteenth Amendments, and that the government must bear the burden of overcoming this presumption by showing that the legislation in question is narrowly tailored to achieve a compelling governmental interest.

Despite the soundness of the *Lawrence* decision and its adherence to the traditional substantive due process jurisprudence established in the *Lochner* era, it is still unclear whether the Court would entertain extending its reasoning to future substantive due process cases. Clearly, Justices Scalia and Thomas would be unwilling to do so, given their scathing dissent in the *Lawrence* decision. It is also important to note that the Court has yet to apply the *Lawrence* framework to subsequent cases. This uncertainty is unfortunate, as the *Lawrence* framework provides substantial hope not only to those individuals in the future who are in "their own search for greater freedom," but also to those individuals in the present such as the Alliance members whose ability to preserve and prolong their lives literally hinges on whether the promises of the Constitution allow them to do so.